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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. NATALIE NICOLE RAGSDALE, Defendant and Appellant.	F071852 (Super. Ct. Nos. F12900361, F14907684) **OPINION**

THE COURT[*]

APPEAL from orders of the Superior Court of Fresno County. Denise Lee Whitehead, Judge.

Thomas P. Owen, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Kathleen A. McKenna and Ian Whitney, Deputy Attorneys General, for Plaintiff and Respondent.

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[*] Before Gomes, Acting P.J., Peña, J. and Smith, J.

Natalie Nicole Ragsdale appeals from the denial of a petition for resentencing under Penal Code[1] section 1170.18, which is part of the Safe Neighborhoods and Schools Act (Proposition 47). Enacted by voter initiative in November 2014, Proposition 47 reduced certain drug-related and property crimes from felonies to misdemeanors. Section 1170.18 provides a mechanism by which a person with a prior felony conviction for an offense that is now classified as a misdemeanor under statutes added or amended by Proposition 47 can petition to have their conviction designated as a misdemeanor and be resentenced accordingly. (§ 1170.18, subds. (a), (f).)

The trial court denied Ragsdale's petition on grounds that her prior convictions, including those for second degree commercial burglary and vehicle taking, were not subject to the resentencing provisions of Proposition 47. As will be explained, the court's ruling was correct with regard to the latter offense but erroneous as to the convictions for second degree commercial burglary. We affirm in part, reverse in part, and remand for further proceedings.

FACTUAL AND PROCEDURAL BACKGROUND

On February 27, 2012, Ragsdale entered a guilty plea in Fresno County Superior Court Case No. F12900361 (hereafter "F12900361") to four counts in a 17-count information in exchange for limited sentencing exposure and the dismissal of all remaining charges. Accordingly, she was convicted and sentenced on three counts of second degree commercial burglary (§§ 459, 460; counts 2, 4, & 6) and one count of identity theft (§ 530.5, subd. (c)(3); count 14). Ragsdale was ordered to pay restitution to commercial entities under count 2 (Winco), and counts 4 and 6 (Fresno Ag Hardware) in stipulated amounts of $143.50 and $621.45, respectively.

[1] Except where otherwise specified, all further statutory references are to the Penal Code.

On October 27, 2014, Ragsdale entered a plea of no contest in Fresno County Superior Court Case No. F14907684 (hereafter "F14907684") to five counts in a 17-count information and admitted the truth of an enhancement allegation in exchange for limited sentencing exposure and the dismissal of all remaining charges. Accordingly, she was convicted and sentenced on three counts of identity theft (§ 530.5, subd. (a), (c)(3); counts 1, 5, & 9), one count of forgery of a driver's license or identification card (§ 470a; count 12), and one count of unlawful driving or taking of a vehicle (Veh. Code, § 10851; count 4).

Following the enactment of Proposition 47, Ragsdale filed a petition for resentencing vis-à-vis her convictions in cases F12900361 and F14907684. The single-page document alleged, in boilerplate language, that her "conviction or convictions were for offenses which would now be punishable as misdemeanors under the Safe Neighborhoods and Schools Act." On June 29, 2015, the trial court heard the petition and summarily denied it as to F14907684, finding that none of the offenses came within the purview of Proposition 47. Arguments were presented concerning F12900361, during which the People noted that although the convictions on counts 2, 4, and 6 were for commercial burglary, each crime was committed by use of a counterfeit check. The trial court thereafter denied the petition as to F12900361, incorporating by reference a legal analysis in prior Fresno County Superior Court decisions wherein convictions for commercial burglaries that involved identity theft (i.e., theft of merchandise by use of stolen checks) were deemed ineligible for resentencing under section 1170.18.

Ragsdale filed a timely notice of appeal as to the "decision regarding Prop. 47 eligibility." Her briefs clarify that she is not challenging the trial court's ruling with respect to the identity theft convictions. Since her arguments focus exclusively on counts 2, 4, and 6 in F12900361 and count 4 in F14907684, we presume all other aspects of the trial court's orders are undisputed and correct. (See *People v. Duff* (2014)

58 Cal.4th 527, 550, fn. 9 [arguments not raised in opening brief are waived]; *People v. Wiley* (1995) 9 Cal.4th 580, 592, fn. 7 [presumption of correctness].)

DISCUSSION

Standard of Review

It is the petitioning defendant's burden to make a prima facie showing of eligibility under section 1170.18, i.e., to demonstrate that the conduct underlying a prior felony conviction would have constituted a misdemeanor had Proposition 47 been in effect at the time of the offense. (*People v. Fernandez* (2017) 11 Cal.App.5th 926, 932 (*Fernandez*).) The People may contest the defendant's eligibility by rebutting the proffered evidence or establishing the existence of a separate disqualifying conviction. (*Ibid*.; see § 1170.18, subd. (i)). We review a trial court's factual findings on such matters for substantial evidence, and apply the de novo standard to questions of statutory interpretation and other issues of law. (*Fernandez, supra*, 11 Cal.App.5th at p. 932.)

F12900361

The California Supreme Court's holding in *People v. Gonzales* (2017) 2 Cal.5th 858 (*Gonzales*) supports Ragsdale's position on the commercial burglary convictions. Key to this issue is Proposition 47's creation of a new crime, "shoplifting," which is defined as "entering a commercial establishment with intent to commit larceny while that establishment is open during regular business hours, where the value of the property that is taken or intended to be taken does not exceed nine hundred fifty dollars ($950)." (§ 459.5, subd. (a).) "This provision is related to the general burglary statute, which also applies to an entry with intent to commit 'larceny' or any felony. (Pen. Code, § 459.)" (*Gonzales, supra*, 2 Cal.5th at p. 862.) As a result of the new law, the act of obtaining property from a commercial establishment by use of a stolen or fraudulent check – conduct "traditionally regarded as a theft by false pretenses rather than larceny" – is now considered shoplifting so long as the property is worth $950 or less. (*Ibid*.)

Ragsdale, citing the stipulated amounts in the restitution order, submits that counts 2, 4, and 6 are based on conduct that would have been construed as shoplifting had Proposition 47 been in effect during the relevant time period. The Attorney General counters that (1) the offenses involved the intent to commit felony identity theft, which was not made a misdemeanor by Proposition 47, and (2) shoplifting requires intent to commit larceny, "which is distinct from the intent to commit theft by false pretenses." These arguments were squarely rejected in *Gonzales*:

> "Section 459.5, subdivision (b) requires that any act of shoplifting '*shall be charged* as shoplifting' and no one charged with shoplifting 'may also be charged with burglary or theft *of the same property*.' … A defendant must be charged only with shoplifting when the statute applies. It expressly prohibits alternate charging and ensures only misdemeanor treatment for the underlying described conduct. The statute's use of the phrase 'the same property' confirms that multiple burglary charges may not be based on entry with intent to commit different forms of theft offenses if the property intended to be stolen is the same property at issue in the shoplifting charge. Thus, the shoplifting statute would have precluded a burglary charge based on an entry with intent to commit identity theft here because the conduct underlying such a charge would have been the same as that involved in the shoplifting, namely, the [fraudulent use of a] check to obtain less than $950." (*Gonzales, supra,* 2 Cal.5th at pp. 876-877.)

In light of *Gonzales*, the trial court erred by ruling that the commercial burglary convictions were ineligible for resentencing under Proposition 47 as a matter of law. However, we do not agree with Ragsdale's contention that the error requires reversal without remand. The trial court made no factual findings with regard to the eligibility issue, and the record before us is inconclusive on that point. While the restitution order strongly suggests the value of the property that was actually stolen or intended to be

stolen was less than $950 (see § 1202.4, subd. (f)), the parties could have theoretically stipulated to amounts that differed from the true economic loss as part of Ragsdale's plea deal. "An ' "essential distinction" ' between trial courts and appellate courts is that ' "it is the province of the trial court to decide questions of fact and of the appellate court to decide questions of law … ." ' [Citation.] Appellate courts do not make factual findings; we review ' "the correctness of a judgment [or order] as of the time of its rendition." ' " (*People v. Contreras* (2015) 237 Cal.App.4th 868, 892 (*Contreras*).)

Furthermore, assuming Ragsdale is eligible for relief based on the nature of the underlying offenses, the trial court had no occasion to consider or rule upon the question of suitability. Even eligible petitioners will be denied relief if the trial court, "in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety." (§ 1170.18, subd. (b).) "Again, that determination must be made in the first instance by the trial court; it is not our role to find facts, especially on an incomplete record." (*Contreras, supra,* 237 Cal.App.4th at p. 892.) Therefore, the matter will be remanded for further proceedings.

F14907684

Ragsdale contends that the unlawful taking of a vehicle in violation of Vehicle Code section 10851, if the vehicle is worth $950 or less, constitutes a misdemeanor theft offense (see § 490.2, subd. (a)). She thus argues that prior felony convictions for vehicle taking may be eligible for resentencing under Proposition 47, and claims the trial court erred by failing to determine the value of the vehicle in the offense underlying count 4. She further contends that construing the theft of an automobile under Vehicle Code section 10851 as a felony while similar property crimes are treated as misdemeanors under Penal Code section 490.2 violates equal protection principles.

The California Supreme Court has granted review in several cases to resolve a split of authority on this very issue. For example, our District and the Third District Court of Appeal are among those which have held, as a matter of law, that felony

convictions of Vehicle Code section 10851 are not subject to resentencing under Proposition 47. (See, e.g., *People v. Johnston* (2016) 247 Cal.App.4th 252, rev. granted Jul. 13, 2016, S235041; *People v. Sauceda* (2016) 3 Cal.App.5th 635 (*Sauceda*), rev. granted Nov. 30, 2016, S237975.) The Sixth District, among others, has adopted a different position. (See, e.g., *People v. Ortiz* (2016) 243 Cal.App.4th 854, rev. granted Mar. 16, 2016, S232344.)

In *Sauceda*, we held that Vehicle Code section 10851 is not affected by the statutory amendments enacted through Proposition 47 and no equal protection violation arises from the different potential punishments for, or the failure to grant retroactive sentencing relief to, those convicted under Vehicle Code section 10851. (*Sauceda, supra*, 3 Cal.App.5th at pp. 644-650.) We decline to hold otherwise in this case. Vehicle Code section 10851 is not by its nature a theft offense, and its exclusion from Proposition 47 confirms there was no intent to modify the punishment scheme separately set forth for the crime of unlawfully driving or taking a vehicle.

In any event, Ragsdale presented no evidence to the trial court on the value of the subject vehicle, and thus failed to carry her initial burden to demonstrate eligibility for relief. (*Fernandez, supra*, 11 Cal.App.5th at p. 932; *People v. Johnson* (2016) 1 Cal.App.5th 953, 963-964.) Her claim fails for this reason alone, regardless of how any related legal issues may ultimately be resolved by our state Supreme Court. Accordingly, we find no error in the trial court's denial of the petition for resentencing as to case F14907684.

DISPOSITION

With regard to case F14907684, the order denying appellant's petition for resentencing is affirmed in full. With regard to case F12900361, the order denying appellant's petition for resentencing is affirmed as to count 14, reversed as to counts 2, 4, and 6, and, as to counts 2, 4, and 6 only, the matter is remanded for further proceedings in accordance with section 1170.18 and consistent with this opinion.